IN THE SUPREME COURT STATE OF MISSOURI

INFORMANT'S REPLY BRIEF					
Respondent.)				
IN RE: BRIAN A. MCKINSEY,)	Supreme Court #SC87			

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POINTS RELIED ON

II.

SANCTION

CONVERSION OF CLIENT FUNDS BECAUSE THE <u>ABA</u>

STANDARDS FOR IMPOSING LAWYER SANCTIONS SUGGEST

DISBARMENT IN CASES OF INTENTIONAL

MISAPPROPRIATION. MITIGATION BASED ON ALCOHOLIC

CONDITION IS NOT APPROPRIATE HERE BECAUSE NO

CAUSAL CONNECTION BETWEEN STEALING CLIENT FUNDS

AND ALCOHOLIC CONDITION HAS BEEN ESTABLISHED.

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ARGUMENT

II.

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BACKGROUND

At trial, Respondent acknowledged his alcoholic condition. He also described extended periods of sobriety. During one of those extended periods of sobriety, Respondent consciously used Mrs. Whitely's money as his own. His use of her money, and his failure to replace her funds, continued during several more months of sobriety.

TIMELINE: SOBRIETY AND STEALING

A timeline of Respondent's alcohol abuse, treatments, and relapses may be helpful.

TIME	EVENT	REFERENCE
1989	Recognition of Alcoholic Addiction	Inf. App. 126-127
1989	Alcohol Treatment in Edwardsville, IL	Inf. App. 127
June 2000-	Commingling of client funds – use of client	Inf. App. 114-115
March 2002	funds for personal use	
January 2001	Depression Treatment following son's death	Inf. App. 128-129, 132
March 2002	IRS problems "coming to a head"	Inf. App. 133-134
		Resp. App. 9
April 2002	Alcohol Treatment Highland Center	Inf. App. 128
	(St. Louis)	
May 2002	Alcohol Treatment Comtrea (Farmington,	Inf. App. 128
	MO)	
April 2002 –	Sobriety	Inf. App. 136
Mid June		Resp. App. 10
2003		
May 19, 2003	Whitely theft - \$35,000 (conscious decision)	Inf. App. 139-140
Mid June –	Relapse – (through July 15, 2003)	Inf. App. 66, 138
Late July		
2003		
Late June –	Relapse – (three weeks ending July 15,	Resp. App. 9-10
July 15, 2003	2003)	

TIME	EVENT	REFERENCE
July 15, 2003 –	Sobriety – "knows right from wrong"	Inf. App. 66
May 2004		
April 6, 2004	Assessment at Professional Resource Center	Resp. App. 2
	(PRC)	
April 9, 2004	1 st DHP hearing (Disclosure of Whitely	Inf. App. 59, 65
	theft)	
May 2004	Relapse – treatment at Boonville	Inf. App. 138
May 2004	Return of converted funds	Inf. App. 88
April 2005	2 nd DHP hearing	Inf. App. 71

FACT CHECK:

CAUSAL CONNECTION OF ALCOHOLISM TO THEFT

In April 2004, just prior to the first DHP hearing, Respondent received an evaluation at the Professional Renewal Center in Kansas. **Resp. App. 2-16**. He argues that the Professional Renewal Center's (PRC) report establishes a causal connection between his alcoholic condition and his misconduct. **Resp. Brief p. 12-13, 18**. In fact, however, the PRC report does not address the allegations relating to misappropriation of client funds; instead, it expressly includes only four disciplinary complaints: of those complaints, two related to failure to perform services; one - from several years earlier - he blamed on his ex-partner, (Mr. McKinsey reported that his former partner filed the complaint because he was angry with him); the last complaint simply reports the IRS

complaint of improper use of his trust account, but not his misappropriation of Mrs. Whitely's funds (Counts XI – XIV and XVI – XIX). **Resp. App. 3**.

That PRC assessment and report occurred before Respondent appeared at trial and before he admitted, for the first time, that he had stolen Mrs. Whitely's money. In other words, while the PRC report does find a causal connection between his condition and past problems with client communication, commingling funds in such a way as to offend the IRS, and his partner's anger, the PRC professionals were not even aware that he had stolen client funds during an extended period of sobriety. The panel did not find and could not have found a causal connection to that conduct.

FACT CHECK:

PROGNOSIS FOR RECOVERY

Respondent also relies on that report as a prognosis for recovery. **Resp. Brief p.**13. Unfortunately for him and for his argument, that report came only two or three months before he started drinking again. **Inf. App. 138**. Also, the PRC report identified several deficiencies in his "recovery potential," including: "coping deficits" and "a lack of accountability and support." **Resp. App. 14**. Several recommendations for continued treatment were made in that report. Those recommendations included:

- (1) Abstinence (*Respondent failed*);
- (2) Monitoring agreement with agency (Respondent provided no evidence that he complied)

Random urine analysis (Respondent provided no evidence that he complied);

- (3) Mentoring agreement (Respondent provided no evidence that he complied);
- (4) Weekly psychotherapy process (*Respondent provided no evidence that he complied*);
- (5) Bi-monthly treatment (DBT) (*Respondent provided no evidence that he complied*);
- (6) Psychiatric consultation (*Respondent provided no evidence that he complied*);
- (7) Return to PRC within six months (*Respondent provided no evidence that he complied*).

Resp. App. 15.

Tests conducted while Respondent was at PRC, along with "his history of excessive drinking, inability to function at work due to drinking and escalating drinking patterns, *place him at considerable risk to relapse.*" (emphasis added). **Respondent's App. 13**. The PRC report is hardly supportive of Respondent's exculpatory or mitigating arguments.

ABA STANDARDS: MITIGATION WHEN?

Respondent suggests that the ABA <u>Standards for Imposing Lawyer Sanctions</u> (1991 ed.) provide a basis for alternative discipline. **Resp. Brief Point II**. Other than to provide support for the proposition that the Court frequently refers to the <u>Standards</u>, further reference to those <u>Standards</u> could not be located in his brief.

Certainly the Court does rely on the ABA <u>Standards</u>. *In re Donaho*, 98 S.W.3d 871 (Mo. banc 2003). A review of the 1992 supplement to the 1991 ABA <u>Standards</u> clearly indicates that, in limited circumstances, physical or mental disability or impairment may mitigate, but not excuse. Section 9.32(h). Comments in the 1992 supplement indicate that, "Direct causation between the disability or chemical dependency and the offense must be established." Section 9.32, Comments, Paragraph 3. The Comments further clarify the effect of rehabilitation on discipline; "A showing of rehabilitation . . . may be considered but should not, in and of itself, be a justification for a recommendation of discipline less than that which would have been imposed upon an attorney in similar circumstances where chemical dependency was not present." ABA <u>Standards for Imposing Lawyer Sanctions</u> (1992 Supp.), Section 9.32, Comments, Paragraph 3.

Respondent also suggests that discipline less severe than that of complete disbarment may "facilitate Respondent's recovery process." Resp. Brief p. 18. Even assuming the Court does have a particular responsibility to use this case to help this attorney recover from the horrible disease of alcoholism, it seems evident that his argument for leniency is nevertheless misplaced. It is axiomatic of addiction recovery programs that the afflicted must fully accept the consequences of their misconduct. The Missouri Bar's Lawyer Assistance Program and the Lawyer's Assistance Committee are, fortunately, willing to provide services not only to active and suspended lawyers but also disbarred lawyers.

CONCLUSION

The ABA Standards relating to mitigation for alcohol addiction must be carefully considered. Without a direct causal connection from his addiction and stealing client funds, no mitigation is available. Reliance on the PRC reporter's finding of a causal connection is misplaced because the reporter was aware of neither the timing nor the fact of this theft. Also, as Respondent explained to the Panel, he consciously stole from Mrs. Whitely during an extended period of sobriety. He then led her to believe her case was still pending. **Inf. App. 11**. The Panel considered and expressly found that the Whitely theft was not the result of any alcoholic or mental condition. **Inf. App. 11**, **14-15**.

Absent mitigation, disbarment is appropriate for misappropriation of client funds.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.) (Sections 4.11 and 5.11).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2005, two copies of Informant's Reply Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

- 1. Includes the information required by Rule 55.03;
- 2. Complies with the limitations contained in Rule 84.06(b);
- 3. Contains 1,615 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
- 4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Sam S. Phillips